SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1968

No. 416

JOHN A. EPLING,

Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Disciplinary proceedings in Ohio are under the exclusive jurisdiction of the Ohio Supreme Court.

Pursuant to its Rule XVIII the Ohio Supreme Court, as of January 1, 1957, put the investigation of charges against attorneys in the hands of a Board of Commissioners on Grievances and Discipline consisting of 17 lawyers appointed by the Supreme Court, one from each of 17 districts in the state, each to serve a term of three years. Under the Rule, charges are heard by a panel of three members of the Board, are reviewed by the entire Board of 17 and are then heard on brief and oral argument by the Supreme Court of Ohio.

That is the procedure followed in this case. Rule XVIII, is attached hereto as Appendix A, Rule XIX, Rules of Professional Conduct is attached hereto as Appendix B.

This case is stated in the opinion of the Supreme Court of Ohio, *Ohio State Bar Association v. Epling,* 15 Ohio St. 2d 23. (Petitioner's brief, p. 21.) We quote from that opinion.

"On the fifth day of December 1962, this court administered a public reprimand to the respondent, John A. Epling, based upon a report of the Board of Commissioners on Grievances and Discipline in which, in part, it was found that respondent had been careless and negligent in the handling of the business affairs of his office as an attorney at law; in collections, and accounting therefor, and 'by his persistent habit of writing and uttering checks' knowing that he did not have sufficient funds on deposit 'to cover them.'

"The matter now before the court resulted from seven charges of alleged professional misconduct of respondent filed by the Ohio State Bar Association with the Board of Commissioners on Grievances and Discipline for investigation and report. A summary of the charges and findings of the board follows:

"Charge No. 1. On or about May 12, 1963, a client employed respondent to collect an account of $53.58. The respondent collected the account in full on November 18, 1963. Respondent failed to account to his client, or make any report to his client. In February 1965, the client forwarded the account to a collection agency and suit was filed. It was not until then that the client learned that respondent had already collected the account. The suit was dismissed.

"Though urged by the relator to settle the account with his client, respondent failed and refused to make any accounting until two days before the board commenced the hearing of these proceedings.

"The board found that Charge No. 1 was supported by the evidence and that the respondent was in violation of Canon 11 of the Canons of Professional Ethics which reads:

"'Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly * * *.'

"Charge No. 2. The board dismissed this charge by reason of conflict in the evidence.

"Charge No. 3. On or about December 1, 1964, respondent was retained to represent the administratrix of an estate. Respondent arranged for the probate of the will and the appointment of the executrix of the estate. Thereafter respondent transferred funds of the decedent into an estate account, paid certain claims against the estate, distributive shares and respondent's attorney fees. Respondent failed to file any other papers required by law to complete the administration, nor did he do anything further to assist in closing the estate. On January 14, 1966, the respondent was discharged as attorney for the estate and the necessary work was completed by others. Respondent appeared to disregard repeated requests by the court to complete his duties for which he had already been paid. The board found such conduct to be in violation of Canons 11, 29 and 32 of the Canons of Professional Ethics.

"Charge No. 4. The conduct of respondent was quite similar in this charge to his conduct in the previous charge. Respondent was retained to advise and assist the executor of an estate in the Probate Court of Gallia County. Respondent assisted the executor in the preparation and filing of the inventory and appraisement, schedule of claims and application to determine inheritance tax and the entry determining said tax, but failed to close the estate for over two and one-half years, although the executor had paid respondent the amount of the tax and attorney fees in full.

The Probate Court had repeatedly urged him to close out the estate, but to no avail. Not until the commencement of these proceedings before the board did he finally finish the administration of the estate.

"The board found that the conduct of the respondent under this charge was in violation of Canons 29 and 32 of the Canons of Professional Ethics.

"Charges Nos. 5, 6 and 7 involve the drawing and issuing of 209 checks by the respondent and issued by him when he knew that he did not have sufficient funds in his bank to honor them. These checks were issued in the period of time between May 14, 1963, and December 15, 1966. Respondent contended that these checks were postdated and delivered with the understanding that he would immediately place funds in the bank to cover such checks. It was established that such a procedure was not proper and was in violation of banking regulations. The board found that a substantial number of these checks were eventually dishonored for failure to have sufficient funds to pay them.

"The board concluded that such widespread and long continued habit of issuing and uttering worthless checks, as well as the other misconduct of the respondent, tended to bring the legal profession into disrepute within the meaning of Canons 29 and 32 of the Canons of Professional Ethics.

"The respondent presented little or no defense other than flimsy excuses for his failure to report collections to his clients and for his failure to perform with reasonable promptness services for which he had already been paid."

The Supreme Court of Ohio approved the report of the Board of Commissioners on Grievances and Discipline and suspended petitioner from the practice of law for an indefinite period.

QUESTIONS PRESENTED

1. May an attorney be disenfranchised in state court proceedings by reason of the application of Canons 29 and 32 of the Canons of Professional Ethics to the banking practices of that attorney which the court concluded tended to bring the legal profession into disrepute in view of the indefinite, vague and uncertain language of said Canons?

2. Where under Rule of State Supreme Court which provides that an attorney who has once received a public reprimand shall upon being found guilty of subsequent misconduct receive at least an indefinite suspension and said Rule provides that Commissioners hear and report findings and make recommendation to the State Supreme Court, may an attorney be indefinitely suspended when the fact of such prior reprimand and the reason for it was made known to the Commissioners who heard and reported on matters in connection with charges of subsequent misconduct?

3. Where a state bar association prior to any proceeding obtains the personal banking records of an attorney from banking in which such accounts are maintained, without the knowledge, consent or permission of such attorney, may such records be introduced in evidence in subsequent disciplinary proceeding involving alleged misconduct of said attorney?

4. Where under Rule of the Supreme Court of Ohio a seventeen (17) member Board of Commissioners is appointed to hear and make findings and recommendations respecting alleged misconduct of attorneys, may such hearing be conducted before only three (3) members when said three (3) members do not report directly to the Supreme Court of Ohio but instead report to the remaining members which do not hear either side to the controversy and which in turn report to the Supreme Court of Ohio?

ARGUMENT

As to Question No. 1

Question number one is not properly before this court for decision. Petitioner was not "disenfranchised" by the Supreme Court of Ohio solely because that court found that his "banking practices" violated Canons 29 and 32 of the Canons of Professional Ethics. On the contrary, the Supreme Court of Ohio suspended petitioner from the practice of law because,

(1) it found that petitioner's continued habit of issuing and uttering worthless checks violated Canons 29 and 32 of the Canons of Professional Ethics; (charges 5, 6 and 7) and,

(2) his failure to account to his client for money collected violated Canon 11* (charge No. 1); and,

(3) petitioner's neglect of his client's business, and his failure to perform services for which he had already been paid violated Canons 11, 29 and 32 of the Canons of Professional Ethics; (charges 3 and 4) and,

(4) the petitioner's acts of misconduct in this case are repetitions of the acts for which the petitioner was disciplined on December 5, 1962, namely, "careless and negligent handling of the business affairs of his office as an attorney at law; in collections, and accounting therefor," and "by his persistent habit of writing and uttering checks knowing that he did not have sufficient funds on deposit to cover them." (Opinion of the court below approving

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* Canon 11

"The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

"Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

the findings of the Board of Commissioners on Grievance and Discipline, petitioner's brief p. 24).

As to Question No. 2

Petitioner complains that "The Panel of the Board of Commissioners and said Board had before them formally the fact of a prior reprimand and this fact was set forth in the charges filed by Relator." (Petitioner's Brief p. 13) And that this fact "influenced their decision on the merits in connection with the present charges" against him.

The Court below answered this complaint as follows:

"Respondent (Petitioner) complains that the Board of Commissioners on Grievances and Discipline was prejudiced against him by reason of the fact that the Board was aware of the former reprimand administered to him by this court. A thorough search of the record discloses that there is no foundation whatsoever for such contention. On the other hand, the record does disclose that in the single instance where there was conflict of testimony—Charge No. 2—the board dismissed the complaint." (Petitioner's Brief p. 24)

Excepting Charge No. 2, there is no real contest on the facts in the proceedings in the court below. Petitioner's answer to the charges against him admitted most if not all factual allegations in the charges, excepting charge No. 2. Accordingly, the findings of fact of the Board are that the present charges (excepting charge No. 2) are either admitted or undisputed. (Petitioner's Brief p. 27). Therefore, petitioner's complaint that the fact of a prior reprimand "influenced their decision on the merits in connection with the present charges" is without foundation in fact.

Unquestionably the Board of Commissioners on Grievances and Discipline considered the fact of petitioner's prior reprimand in making its *recommendation to the court*

on discipline. In making its recommendation to the Supreme Court of Ohio the board has a duty to consider all of the facts bearing upon petitioner's fitness to continue in the practice of law. In fulfilling that duty the board must consider the prior record of the attorney be it good or bad.

"It is well established that mitigating circumstances may be considered in determining the punishment to be imposed in disciplinary proceedings, such as motives and purposes which actuated the attorney, his previous good record, his characteristics and nature, testimonials as to his good character and reputation or his youth and inexperience and the fact that he was not guilty of intentional wrongdoing.

"If such mitigating circumstances may be considered in alleviating or lightening the penalty does it not follow that incriminating circumstances, such as the previous poor record of an attorney, his years of practice, knowledge of wrongdoing, repeated misconduct, etc., may like wise be considered in determining whether or not a more severe penalty should be imposed? The fact that an offense is a repetition of offenses for which the attorney previously has been disciplined shows that the wrong is not unintentional but is done deliberately with knowledge that such conduct is forbidden and thus merits a greater penalty." *March v. State Bar of California,* 2 Cal. 2d 127, 39 P. 2d 403.

Petitioner does not contend that the Supreme Court of Ohio was prejudiced against him by reason of the fact that that court had knowledge of the fact that it had administered a prior reprimand to him, or that such knowledge influenced the court in making findings against him on the present charges. And, in the final analysis, it is that court that has full responsibility for determining what the facts are and what action should be taken on those facts, *Cleve-*

land Bar Association v. Pleasant, 167 Ohio St. 325, 335, cert. den. 358 U.S. 842, wherein the court said:

> "There can be no question now of the inherent power of this court as to disciplining of attorneys, and, therefore of its power to provide by rule the procedure in reference to hearings upon such questions. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline. Such board or its panels have no power to discipline an attorney, except with reference to a private reprimand, and surely that cannot constitute a judgment, for the power to give such a reprimand would be inherent without authorization by this court. As to any other disciplinary action, all that the board can do is investigate and make findings of fact and recommendations and the only order or decision is made solely by this court."

As to Question No. 3

Petitioner states (Petitioner's Brief p. 16): "The record clearly supports that as regards charges 5 and 6, records of Respondent's (petitioner's) own personal, business and trust checking account records in the Ohio Valley Bank and the Commercial and Savings Bank, Gallipolis, Ohio, were placed in evidence through bank personnel under subpoena duces tecum." Petitioner further states that the information to formulate these charges was obtained without his consent, and that he had no opportunity to object to respondent reviewing said records.

Charges 5 and 6 involve the drawing and issuing of 200 checks by petitioner, and issued when he knew he did not have sufficient funds in his bank to honor them. (Opinion of Supreme Court of Ohio, petitioner's brief p. 23)

To these charges petitioner filed his Answer in which he admitted the overdrafts but "contended that these checks were post-dated and delivered with the understanding that

he would immediately place funds in the bank to cover such checks." (Opinion of Supreme Court of Ohio, petitioner's brief p. 23)

In addition to the above admission by petitioner, the record will also show that the bank records covering petitioner's checking accounts were admitted into evidence without objection by petitioner and, in fact, by stipulation of counsel. If petitioner objected to the admission of his bank records into evidence on the ground of privacy or self-incrimination, the time for asserting his objections was when those records were offered as evidence. Petitioner made no such objection and he waived any he had.

Petitioner also contends that this court's decision in *Spevack v. Klien*, 385 U.S. 511, is applicable to these facts.

As we understand the opinions of this court in *Spevack*, essentially this court held that since the Fifth Amendment to the Federal Constitution was now binding upon the States, the penalty of disbarment for invoking it constituted an impermissible denial to lawyers of a constitutional right available to others. Accordingly an attorney against whom there is not one iota of evidence of misconduct may not be disbarred merely for refusing to answer questions or to furnish information upon the grounds of constitutional privilege.

Certainly the *Spevack* case has no application here. The privilege against self incrimination was not invoked. As indicated above the bank records of petitioner's checking account were admitted into evidence without objection and by stipulation of counsel. The record will show that petitioner testified at great length concerning those bank records.

As to Question No. 4

Petitioner complains, (petitioner's brief pp. 17 and 18) that, "under Rule XVIII of the Rules of the Supreme Court

of Ohio, in particular paragraphs 10 and 14, the actual hearing is before 3 members of the Board of Commissioners who are charged to hear and take evidence and report to the full board. The full Board of Commissioners is then charged to review and report to the Supreme Court of Ohio. In short, there is no provision for, nor was there here, any direct reporting by the panel members who heard this case to the Supreme Court of Ohio."

Petitioner also questions the thoroughness of the full Board's review and complains of a lack of an opportunity to appear before the full Board and raise questions. (Petitioner's brief p. 19)

Petitioner contends that the "absence of review in the fullest and usual manner and method and the justifiable inference drawn from the record as to the limited extent of review has deprived Respondent (petitioner) of due process of law."

Petitioner admits, albeit indirectly, (petitioner's brief p. 19) that he filed a brief with the hearing panel which summarized the evidence and presented his position on that evidence. That brief was before the full Board of Commissioners for review.

Due process in disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the hearing be essentially fair. *Bradley v. Fisher*, 13 Wall 335, 20 L ed. 646.

We submit that these proceedings before the Supreme Court of Ohio are free from any due process defect. Petitioner was given notice of the charges against him. He was given an opportunity to and did defend himself before the hearing panel of the Board of Commissioners who received the evidence in this case, presented written and oral argument to that hearing panel, written argument to the full Board of Commissioners, and written and oral argument to

the Supreme Court of Ohio stating his objections to the findings and recommendations of the Board of Commissioners. Surely, procedural due process does not require more.

CONCLUSION

There is no reason to analyze the law presented by petitioner in support of his Petition for a Writ of Certiorari. The petitioner had a full and fair hearing before an impartial tribunal, the Supreme Court of Ohio.

The Ohio State Bar Association respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing brief have been mailed by first class mail with postage prepaid to Attorneys for Petitioner, George E. Tyack, James C. Justice and W. P. Cherrington, respectively at their offices.

/s/ SAMUEL T. GAINES
of Counsel for Respondent

APPENDIX A

RULE XVIII[2]

DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(1) Creation of Board of Commissioners on Grievances and Discipline. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: *District 1,* comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. *District 2,* comprising Darke, Miami, Montgomery, Preble and Shelby Counties. *District 3,* comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. *District 4,* comprising Lucas County. *District 5,* comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. *District 6,* comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. *District 7,* comprising Franklin County. *District 8,* comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. *District 9,* comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. *District 10,* comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. *District 11,* comprising Portage and Summit Counties. *District 12,* comprising Cuyahoga County. *District 13,* comprising Ashtabula, Columbiana, Geauga, Lake, Mahoning and Trumbull Counties. *District 14,* comprising

[2] Same as former Rule XXVII as amended March 11, 1964.

Carroll, Stark and Tuscarawas Counties. *District 15,* comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. *District 16,* comprising Allen, Auglaize, Hardin and Mercer Counties. *District 17,* comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners, and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof.

(2) Jurisdiction of Board. The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor of law in this State, or

(d) upon reference by his Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court but did not take place in the actual presence thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise.

(3) Referral for Investigation. The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

(4) Application of Rule; Authority and Duty of Local Committees. From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in

cases where misconduct, contempt, or mental illness is found; provided, however, that nothing herein shall affect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

(5) Definitions.

(a) Misconduct. Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) Mental Illness. Mental illness shall mean the condition defined in Section 5122.01 (A), Revised Code.

(6) Manner of Discipline. Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) Effect of Discipline. A person disbarred shall never thereafter be readmitted to the practice of law in this State. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) The Complaint; Where Filed; By Whom Signed. A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to rep-

resent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

(9) Duty of the Board Upon Filing of the Complaint.

(a) Notice to Respondent. The Secretary of the Board of Commissioners shall send a copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

(b) Suspension of Right to Practice Pending Disposition of Misconduct Complaint. After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported by a certified copy of the judgment entry of the Court convicting the Respondent.

(c) Mental Illness Suspension. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination as provided in (d) hereof, the Board shall forthwith certify the com-

plaint to this Court and the Court may suspend the Respondent from the practice of law.

(d) Examination. If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(e) Termination. Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(10) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(11) Dismissal of Complaint. If the panel finds that the complaint or evidence is insufficient, the panel shall make its certified report of the proceedings and recommendations

to the Board of Commissioners which shall review the proceedings, and shall dismiss the complaint, or refer the matter back to the panel for further hearing or the administering of a private reprimand, or may proceed upon the certified report of the proceedings before the panel. The Secretary of the Board of Commissioners shall give notice of a dismissal to the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county or counties in which the Respondent resides and maintains his office, and of the county or counties from which the complaint arose.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(12) Private Reprimand; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certi-

fied report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board After Review. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this

Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) Show Cause Order Issued by the Court to Respondent. On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

(18) Answer Briefs. Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order. After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may

find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

(20) Proceedings Private; Exceptions. All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except

(a) Where the Respondent shall request in writing that they be public, or

(b) Where proceedings filed with the Supreme Court

of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

(21) Petition for Reinstatement. No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State, or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(22) Contents of Petition for Reinstatement. Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or asso-

ciations in the County in which he resides at the time of the filing of the petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against him.

(23) Costs to be Deposited with Petition for Reinstatement. Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(24) Requisites for Reinstatement. No person shall be reinstated unless he has established by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule XVII shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(25) Petition for Reinstatement Referred to Board of Commissioners. Unless denied forthwith for insufficiency

in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners. The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22) (c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition to readmission. If the final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof.

If the final report should recommend granting of the petition any person or organization referred to in Section (22) (c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

(27) Manner of Service of Notices, etc. Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

(28) Quorum of Panel or Board. A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(29) Clerk is Agent for Service of Notices on Non-resident Attorney. Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules

of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

(30) Manner of Service on Clerk; Record of Such Service Not a Public Record. All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(31) Power to Issue Subpoenas. In investigations and proceedings under this rule, upon application by the Chairman, Vice Chairman, Secretary, or Counsel of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly

organized local bar association in the state authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any subcommittee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

(32) May Order Depositions. The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(33) Effect of Refusal to Testify. The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(34) Rules of Evidence. All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(35) Docket of Complaints. The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(36) Board May Prescribe Rules. The Board of Commis-

sioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

(37) Rule to be Liberally Construed. The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any non-prejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of this amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule becomes effective shall continue to apply.

APPENDIX B

RULE XIX[3]

RULES OF PROFESSIONAL CONDUCT

Section 1. These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XVIII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association as amended are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. (The Canons of Professional Ethics were adopted November 13, 1952, and are set forth in 175 Ohio State Reports. The Canons of Judicial Ethics as amended were adopted January 27, 1954, and are set forth in 160 Ohio State Reports.)*

Section 2. An attorney at law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

Section 3. An attorney at law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

Section 4. An attorney at law shall not acquire an interest adverse to a client in a subject matter concerning which the attorney has been employed.

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[3] Same as former Rule XXVIII.

* Canons of Professional and Judicial Ethics are set forth also in 176 Ohio State Reports.

Section 5. An attorney at law shall not, directly or indirectly, without the consent of his client, purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which he appears as attorney for a party.

Section 6. An attorney at law shall not represent conflicting interests except with the consent of all parties concerned.

Section 7. An attorney at law shall not accept professional employment without first disclosing to his prospective client his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.

Section 8. An attorney at law shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of and in the course of his employment by such client or former client.